First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2019/0077

Heard at Field House on 9 July 2019

Before
Judge Stephen Cragg Q.C.

Tribunal Members
Rosalind Tatam
Roger Creedon

Between

William Cooke

Appellant

and

The Information Commissioner

Respondent

The Appellant was represented by Ben Williams of counsel

The Information Commissioner was unrepresented

DECISION AND REASONS

INTRODUCTION

1. On 3 April 2018 the Appellant wrote to Transport for London (TfL) and requested the following information:-

> "I would like a list of all residential property included in the 2015 safeguarding zone.
>
> Your [Name Redacted], a Crossrail 2 safeguarding manager, gave evidence at a planning hearing regarding [Address Redacted], on the 20th February 2018, whereby he stated that the property was included in an as yet unpublished future safeguarding map. I would like a list of all residential property included in that map and a copy of said map.
>
> This information is not being requested to further any commercial purpose."

2. TfL responded on 26 April 2018 and disclosed some of the requested relevant information, namely a list of properties within the Areas of Surface Interest identified in the 2015 Crossrail 2 Safeguarding Direction. TfL also directed the Appellant to where he could find a published map associated with the Direction. TfL declined to disclose an unpublished future Safeguarding zone map, citing regulation 12(4)(d) EIR as it said this was material still in the course of completion. TfL argued that the public interest favoured finalising this information before it was released.

3. The Appellant requested an internal review on 27 April 2018 and drew the attention of TfL to 'a letter from a TfL Safeguarding Manager dated 10 March 2017, some of the content of which he said was based on the information that TfL was now withholding', as the Commissioner puts it in her decision notice.

4. TfL addressed the Appellant's point concerning the Safeguarding Manager's letter in its internal review of 21 June 2018 and maintained its position that the remainder of the requested information was exempt from release under

regulation 12(4)(d) EIR.

5. However, during the Commissioner's investigation, TfL reconsidered its position and disclosed to the Appellant a part of the future Safeguarding zone map that includes the Appellant's own property, on the basis that this was the information the complainant had requested. The Appellant then informed TfL that his request was for the map that showed the full revised Safeguarding route, and not just the part of the map that includes his property.

6. TfL confirmed to the Commissioner that it was prepared to consider the Appellant's position as a clarification of his original request and not as new request. Thus, on 21 December 2018 TfL provided a fresh response to the request. It withheld the full revised Safeguarding route under regulation 12(5)(e) EIR and confirmed its view that the public interest favoured maintaining this exception. The matter was then passed to the Commissioner without the need for a further review.

RELEVANT LEGISLATION

7. The relevant parts of regulation 12 EIR reads as follows:-

> **12.— Exceptions to the duty to disclose environmental information**
> (1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if–
> (a) an exception to disclosure applies under paragraphs (4) or (5); and
> (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
> (2) A public authority shall apply a presumption in favour of disclosure.
> (3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data

shall not be disclosed otherwise than in accordance with regulation 13.

(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that–

(a) it does not hold that information when an applicant's request is received

(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect–

…

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest..

DECISION NOTICE AND APPEAL

8. The Commissioner issued a decision notice dated 15 February 2019 which upheld TfL's reliance on reg 12(5)(e) EIR and the Appellant filed an appeal dated 14 March 2019. The substance of both the decision notice and the appeal are set out and considered below.

9. We adopt what the Commissioner said about the application of reg 12(5)(e) EIR in the decision notice as follows:-

> The Commissioner considers that in order for this exception to be applicable, there are a number of conditions that need to be met. She has considered how each of the following conditions apply to the facts of this case:
>
> - Is the information commercial or industrial in nature?
> - Is the information subject to confidentiality provided by law?
> - Is the confidentiality provided to protect a legitimate economic interest?
> - Would the confidentiality be adversely affected by disclosure?

10. The decision notice sets out TfL's description of the contents of the requested information:-

> 26 … the request relates to the release of proposed revisions to the 2015 Safeguarding Directions. The proposed revisions, which it says are continually evolving until the Secretary of State for Transport gives full approval, would provide advance information directly affecting in excess of one thousand residential, commercial and community use properties. These properties will be the subject of future acquisitions, if the necessary powers are confirmed by the Government for the future delivery of Crossrail 2. As decisions as to how the project may be taken forward have yet to be confirmed, the document requested, and therefore the properties that may be directly affected, are still subject to change.

11. The Appellant does not take issue with the four stage test set out by the Commissioner for establishing whether reg 12(5)(e) EIR applies. The Appellant is also not specific about which part of the four-stage test has not, in his view, been met. Rather, the essence of the Appellant's appeal case, as presented at the oral hearing, is that the Commissioner has accepted, wholesale, an argument about land values of 'in excess of one thousand…properties' from TfL that does not stand up to scrutiny. The Appellant's case is that if the argument about land values is flawed, then TfL's reliance on reg 12(5)(e) EIR cannot be sustained and the appeal should be allowed. The Appellant's skeleton argument explains that:-

> '…it is the Appellant's contention that underpinning the decision was a flawed reliance on TfL's contention that disclosure would increase property value and threatens the entire foundation of CR2 where it is equally likely [the Appellant adds here a footnote that 'The Appellant would submit that it is, in fact, more likely'] that disclosure would lead to a decrease in values'.

12. On that basis it is necessary to set out in this decision in more detail than usual the relevant passages in the Commissioner's decision notice with which the Appellant disagrees.

13. Thus, the decision notice explains TfL's position that:-

> 27. In the context of the project, once land has been safeguarded it becomes protected and no development should take place without Crossrail 2 being notified, to determine whether it would have an impact on the future ability to build or add to the future costs associated with operating the railway. All land and property has an existing use value which is a figure for what it is worth in its current form. Anything that might change the status of that land and gives greater certainty about the future development prospects will inevitably add to the value to that land. This 'hope value' will increase as the likelihood of new alternative, more profitable, uses for that land become more certain.
>
> 28. According to TfL, there are a wide range of studies that have been undertaken in the UK and in other developed countries which have examined the underlying reasons for land value increases. The general consensus and considered view in the property industry is that releasing details of future infrastructure investment and the land required for future transport infrastructure will inevitably lead to an upward pressure and increase in land values.
>
> 29. TfL says that it has been widely reported that infrastructure projects can '*provide investors with the next best place to invest*.' It has provided the Commissioner with part of a report from real estate fund management company DTZ Investors which, it says, evidences this point. In the report DTZ Investors provide strategic advice to their clients on how to capitalise from transport infrastructure projects.
>
> 30. TfL has also referred to the UK Government, House of Commons, Housing, Communities and Local Government Committee Land Value Capture Tenth Report of Session 2017–19. This expresses the view that "*Land values increase for many reasons – not least from economic and demographic growth but some of the most significant increases arise from public policy decisions, in particular the granting of planning permission and the provision of new infrastructure*."
>
> 31. This report also goes on to say "*The present right of landowners to receive 'hope value' – a value reflective of speculative future planning permissions – serves to distort land prices, encourage land speculation, and reduce revenues for affordable housing, infrastructure and local services*" TfL argues that releasing information about unprotected land that might be needed to construct the railway, but does not have any statutory protection, would without doubt

increase the cost of the land and in turn inflate the cost of the scheme, which would have to be borne by the taxpayer.

14. The Appellant argues that these statements about the inevitable upward pressure on land values in the way described are actually based on no evidence at all. They are based on what he calls 'generic assertions in the context of a real estate fund management company report and views expressed in the House of Commons'. As a contrary example, the Appellant points to his own property which is, as he can see from the information that has been disclosed to him, inside the proposed new safeguarding area and right on the edge of the 2015 safeguarding area.

15. However, as the Appellant explains not only has the value of his land not increased, he is now subject to 'blight'. No one will buy his property and he has been refused a business loan by his bank to develop his site because his bank is concerned about the uncertainty caused by the Crossrail 2 plans and the 'additional level of risk' which has been generated. The Appellant provided a letter dated 3 May 2019 which confirmed the position. The Appellant complains that the vast majority of other residents in the safeguarding zone will in fact find themselves in a similar position – unable to sell because of the uncertainty of CR2.

16. Likewise, the Appellant complains about the accuracy of the next paragraphs from the Commissioner.

> 32. TfL has provided the Commissioner with example of 'hotspots' identified along the Crossrail 2 route in areas currently not safeguarded that could still be needed as part of its future proposals. These hotspots are sites where Crossrail 2 is aware that there is current development interest and there is the possibility that these identified sites will be brought forward for development by other parties. Using this data it is able to look at how the value of these sites would increase if they were developed. The values for the current status of the land are based on current valuations and market information. Assuming that these

development interests would be granted planning permission (which is based on information from discussions with the Local Planning Authorities about how they would be likely to favour the application assuming it were to come forward) this provides TfL with a 'hope value' uplift to the land.

33. These figures are then projected forward based on the market price of residential units in the area. The prices Crossrail 2 used were based on a two bedroom residential property within the area, and the information taken from reviewing property web sites (which is why the figures provided to the Commissioner vary). A two bed property was taken as a reasonable price indicator by Crossrail 2 as it assumes that there would be a range of one, two, three (and above) bed residential units developed on a site.

34. An additional 20% was then added to these figures to reflect the additional property costs associated with compensation payments and other costs associated with administering a future Compulsory Purchase for a site in the event that it was built.

35. TfL acknowledges this is not an exact science given market variability, but says it is still clear that releasing information regarding the possible future Safeguarding of land, without that land having the benefit of Statutory Safeguarding, could potentially end up costing the project more than £2bn in additional land values. This is particularly the case if this information means that the decision to develop land is progressed or accelerated ahead of a Government decision and land was required by the project to deliver Crossrail2.

17. The Appellant complains that, once again, this approach is not borne out by the example of his own property. The Commissioner has cited almost verbatim from the arguments sent to it by TfL, in particular from a letter sent to the Commissioner by TfL on 11 February 2019, but has not interrogated the reasoning at all. Nevertheless, the Commissioner's main conclusions are that:-

37. The Commissioner considers that TfL's arguments on this point are strong. She is satisfied that the requested information is commercial or

industrial in nature and that the first condition above has therefore been met.

> 47…. She considers that disclosing the requested information would have the effect that is identified in the exception; namely, disclosure would adversely affect TfL's legitimate commercial interests. The Crossrail 2 infrastructure project is still very much a live project. Releasing information on what land TfL may need to acquire along the entire length of the route, before that land has statutory protection, would, because of the potential value of such land to TfL, inflate the land's cost and jeopardise the Crossrail 2 project.

18. The Appellant argues that TfL's arguments are not strong and have not been established. There is no witness statement from TfL to support the assertions made, for example, from an official with specific expertise or experience in this area. There has been no opportunity for the Appellant or the Tribunal to test the points made by TfL. It is certainly the case that the Commissioner did not query what she was told. The Appellant argues that the presumption in favour of disclosure (see reg 12(2) EIR) has not been displaced in this case.

19. In such circumstances, the Appellant also argues that it would be in the public interest to disclose the information, and we deal with this argument in more depth later in the judgment.

DISCUSSION

20. It is the case that the argument in favour of non-disclosure is largely contained in the letter to the Commissioner dated 11 February 2019 from TfL, and the documents annexed to that letter. TfL has not applied to join this appeal as a party, and has not made any written or oral submissions to the Tribunal or provided a witness statement. It is also the case that the Commissioner has set out large excerpts of TfL's letter in the decision notice, verbatim, and accepted the contents with very little comment.

21. At the start of the hearing we also established, from one of TfL's observers at the hearing, that the Commissioner had produced the decision notice without having viewed either part of the disclosed information, namely the safeguarding map and the list of all the residential properties. It seemed to the Tribunal that it should be straightforward for us to be supplied with the withheld information, and sensible for us to consider it. The Tribunal made appropriate directions and has now had sight of an electronic copy of the safeguarding map which includes the unconfirmed proposed November 2017 safeguarding limits.

22. The 11 February 2019 letter from TfL to the Commissioner included a number of appendices. These were all included in our open bundle and available to the Appellant, apart from Appendix E which was provided to the Tribunal in a closed bundle. TfL's letter describes it as follows (it will be noted that this description was reproduced by the Commissioner at paragraph 32 of the decision notice):-

> Appendix E provides an example of 'hotspots' identified along the Crossrail 2 route in areas currently not safeguarded that could still be needed as part of its future proposals. These hotspots are sites where Crossrail 2 is aware that there is current development interest and there is the possibility that these identified sites will be brought forward for development by other parties. Using this data it is able to look at how the value of these sites would increase if they were developed.

23. Appendix E was sent to the Tribunal by the Commissioner as the withheld information and the Registrar made a rule 14(6) direction on that basis. In fact, it is not the withheld information, but documentary evidence supporting the non-disclosure of the withheld information and, in directions, we have amended the rule 14(6) notice accordingly.

24. We will consider the information contained in the appendices available in the open bundle (and considered by the Commissioner in the decision notice). Thus, the investment company magazine from DTZ investors from 2018, referred to by TfL and the Commissioner, is a relatively unsurprising article showing that commercial property values increase along the routes of major infrastructure projects such as Crossrail with values peaking about seven years after royal assent has been given to a project. It does show, however, that investors are being actively advised about the benefits of purchasing properties in these areas.

25. The House of Commons report on 'Land Value Capture' (HC 766, 13 September 2018), confirms that the value of land can increase when planning permission is granted or where land is close to improvements in infrastructure. Thus paragraph 17 states (footnotes removed):-

> 17. Large uplifts in land values were estimated as a consequence of major infrastructure projects, although their benefits were far more diffuse. The Greater London Authority (GLA) and Transport for London (TFL) highlighted a study by real estate advisors, GVA, which found that development dependent on the new Elizabeth line would create a potential value uplift of £13 billion in residential values and £215 million in commercial values by 2026. Julian Ware, from TFL, told us that methodology prepared by KPMG and Savills estimated that eight prospective transport projects in London, including Crossrail 2 and the Bakerloo line extension, could generate a land value uplift of £87 billion, although 65% of this would be realised in the existing residential market.

26. In this appeal, however, TfL's argument against disclosure appears to be premised on a different basis to simply arguing that property values increase along the route of a transport project. Thus, the route of CR2 is already known and so those who would seek to speculate have already been alerted to where the possible land value increases might occur (if and when CR2 is built).

27. TfL's specific concern appears to be that if the new proposed safeguarding limits are disclosed now, then speculators would (a) seek to obtain land within the proposed new limits; (b) possibly apply for planning permission from the local authority; but (c) never have to develop the site because when TfL comes to purchase the land for CR2 it will have to pay the speculator the additional 'hope value' for the land, that is (in the words of the House of Commons committee) 'a value reflective of speculative future planning permissions'. TfL's case is that is important to withhold safeguarding proposals about the hotspots identified in the closed material until such time that land can have the benefit of statutory safeguarding after the scheme has been approved. The requested map of the updated route has not been published by TfL.

28. Having seen in the closed material (Appendix E) the document that sets out the 'hotspots' identified along the CR2 route, which are not currently safeguarded and that could still be needed as part of the future CR2 proposals, we are satisfied that the four considerations for the engagement of Reg 12(5)(e) EIR as identified by the Commissioner in the decision notice are made out.

29. In addition to the general public interest in knowing about the proposed railway that will be very important for London, the central argument raised by the Appellant is that the underlying argument about potentially increasing land values along the route is flawed. However, we are satisfied that it is sensible and logical for TfL to conclude that investors will seek to take advantage of disclosed information about potential safeguarding areas; and it is sensible and logical for TfL to conclude that investors will buy property in those areas in the hope that if and when TfL need the property for CR2 then there will be increased profits to be made. The detailed list of 'hotspots' shows how and where this is most likely to occur. In our view, the

Commissioner was entitled to rely on the information provided by TfL in reaching her conclusions in the decision notice.

30. The fact that we are satisfied that TfL's argument is sound, does not mean that we dismiss the Appellant's experience of the effect that CR2 has had on the value of his property. Indeed, the Land Value capture report at paragraph 20 recognises that:-

> Many also stressed the distributional argument for capturing land value: that it is not fair that such significant profits, arising in the main from public policy decisions, should accrue to a small minority of landowners and that those who are disadvantaged by development generally do not receive some element of compensation.

31. Thus, TfL can be right that big profits would likely be made by some investors if there is disclosure of the withheld information; while the Appellant can also be right that there are people like him who are disadvantaged by the proposed plans. But simply because the Appellant (and no doubt others) are disadvantaged, does not mean that TfL's argument is 'flawed' (as the Appellant submitted), and, as we have said, the evidence about the 'hotspots' we have seen strongly indicates that TfL is right to be concerned.

32. As we have found that the central appeal point made on behalf of the Appellant is not made out, then in our view the four stage test for establishing that the exemption in reg 12(5)(e) EIR is met.

33. Thus, we agree with the Commissioner's reasons for finding that the information is commercial in nature, and this clearly must be so if investors would be able to profit from it if disclosed. The nature of the information – it is not in the public domain, it concerns a multi-billion pound national infrastructure project, and a decision is awaited from government – means that the information is subject to confidentiality provided by law as explained by the Commissioner at paragraph 41 of the decision notice. There

is a legitimate economic interest to be protected by the confidentiality, given the levels by which 'hope value' is expected to increase if there is disclosure at this point. As the Commissioner found at paragraph 47 of the decision notice, disclosure would adversely affect TfL's legitimate economic interests, and so it follows that the confidentiality designed to protect such harm would be adversely affected by disclosure.

34. Although not emphasised at the appeal hearing, we should record that in his appeal grounds the Appellant argued that disclosure would not adversely affect the legitimate economic interests of TfL for a further reason: there would no increase in property value as compensation for the compulsory purchase of land as part of the CR2 project will be quantified on a 'no scheme' basis, where allowance is made for the project's affect upon land values.

35. We note that in her response to the appeal the Commissioner considered this point. She noted that in the Land Value Capture report expert opinions were considered to the effect (see para 109) that the 'no scheme' principle did not always sufficiently reduce land values, that TfL had recorded in the closed material its concerns about 'hope value' increases, and the impact these would have on the cost of the project. After recording some support for the 'no-scheme' principle the Land Value Capture report states:-

> 109. However, others argued that the 'no-scheme' principle did not reduce land values sufficiently. Shelter told us that this approach was "unlikely to dramatically impact land values or on the amount of value captured for betterment", arguing that "market distortions inherent in the legal framework will continue to obscure the true market value of sites". Professor Henneberry explained that the extent to which the 'no-scheme' principle would reduce value "very much depends on the circumstances". For land in the middle of the countryside, which would not otherwise receive planning permission for housing, the entire development value could be attributed to the scheme. However, he highlighted that most work was undertaken within constrained urban areas—such as town extensions and redevelopments—where the hope value was much higher.

36. Thus, we agree with the Commissioner that disclosure of the proposed safeguarding zone is likely to impact on property prices to the disadvantage of TfL even taking the 'no scheme' principle into account (much of the CR2 development will, of course, be in constrained urban areas).

Public interest test

37. The exemption in reg 12(5)(e) EIR is subject to a public interest test. In the hearing additional submissions were not made on this point on the Appellant's behalf, although counsel for the Appellant answered general questions from the panel. However, the issue is raised in the Appellant's appeal grounds and mentioned in the skeleton argument.

38. If our conclusions are right about the applicability of reg 12(5)(e) EIR, in this particular case that will go quite a long way to settle the public interest issue. That is because we have effectively accepted that large sums of taxpayers money will potentially be saved if the information at this point is withheld. It is not understood that the Appellant disputes that there is a public interest in delivering CR2 without unnecessarily inflated costs.

39. It is also the case that when the new safeguarding zone has been approved, the details will be published and so withholding the information is a temporary position. There will also be a public consultation process even if there is approval for the CR2 route.

40. Against this there is the general principle that transparency about major public schemes such as CR2 is important, and there should be as much information made available for scrutiny as possible. The Appellant, understandably, raises his own situation where he cannot sell his property but cannot make a claim for blight, and we accept there will be others, perhaps many others, in the same situation. He argues that there is a public interest therefore in disclosing the information before the proposed

safeguarding route has been approved. He argues that TfL is effectively concealing the totality of blight liability by failing to disclose, and he is unhappy with what he says are discrepancies in the financial information that has been made public by TfL, about the potential additional costs if there is disclosure.

41. We take all these factors into account, but we note that that there will be approval (or otherwise) of the new safeguarding limits in due course, that there will be a consultation process, and that statutory provisions in respect of blight will be available to affected landowners. The relevant information will be disclosed and be available for public scrutiny as part of the process.

42. Thus, although the factors raised by the Appellant are relevant, and we do not doubt the very real affect that CR2 has had on his property and his development plans, in our view the public interest in ensuring that CR2 is delivered as economically as feasible outweighs these factors, and therefore the public interest is in favour of non-disclosure of the unpublished future safeguarding map and also the list of all residential property included in that map.

43. For these reasons the appeal is dismissed

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 22 July 2019